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No. 65

In the Supreme Court of the United States

OCTOBER TERM, 1946

FEDERAL COMMUNICATIONS COMMISSION,
PETITIONER

v.

WOKO, INCORPORATED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION

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OPINIONS BELOW

The findings and conclusions of the Federal Communications Commission (R. 23–38) have not yet been reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 59–73) is reported in 153 F. 2d 623.

JURISDICTION

The judgment of the Court of Appeals was entered on January 21, 1946 (R. 73). The

petition for a writ of certiorari was filed on March 19, 1946, and was granted on April 22, 1946 (R. 58). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Communications Act empowers the Federal Communications Commission to deny an application for renewal of a radio station license on the ground that the applicant has wilfully made false statements in applications and reports, has thus indicated that it cannot be entrusted with the responsibilities of a license, and, consequently, that renewal would not serve the public interest, convenience, and necessity.

2. Whether the court below erred in reversing the order of the Commission on the ground that the Commission is required to make findings on other issues even when, upon consideration of the evidence before it, the Commission has concluded that an applicant's character is such that it is not qualified to receive a renewal of its license.

3. Whether, even if the Commission is required to make findings on other issues, the court below improperly required it to take into consideration the effect of a denial of an application for renewal of a license upon the value of the property used in the operation of the station.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended 47 U. S. C. 151, *et seq.* (hereinafter referred to as the "Communications Act"), are printed in the Appendix, *infra*, pp. 53–59.

STATEMENT

This case arises upon the application for renewal of its station license, filed by the respondent with the Commission, and dated September 28, 1946 (R. 7–17).[1] Upon consideration of the respondent's application, the Commission was unable to determine that public interest, convenience, or necessity would be served by a renewal, and, accordingly (see Section 309 (a) of the Communications Act, Appendix, *infra*, p. 56) it designated the application for hearing upon the following issues (R. 18):

> 1. To determine whether the representations and statements made to the Commission or its predecessors, the Federal Radio Commission, by the licensee, its officers, directors, stockholders, or agents, with respect to the ownership or transfer of, subscription to, or consideration paid for the stock of WOKO, Inc., truly and accurately reflect the facts.

[1] There were, in fact, two applications: one for the main station (R. 7) and one for the auxiliary transmitter (R. 12). See R. 18. For purposes of this case, they may be treated as one.

2. To determine all the circumstances and conditions under which the stock of WOKO, Inc., has been issued, transferred or assigned.

3. To determine whether or not the applicant is qualified to continue the operation of Station WOKO.

4. To determine whether, in view of the facts adduced under the foregoing issues, public interest, convenience, and necessity would be served by a grant of this application.

The respondent filed a notice of appearance (R. 20) and a petition to amend and enlarge the issues (R. 20–22). In its petition, the respondent sought to bring within the scope of the hearing (1) the past and proposed nature, character and extent of its program service; and (2) the past and proposed "nature, character and extent of the activities and/or policies of the licensee, its officers, directors, stockholders, agents, and/or employees, with respect to the operation of the station, the public service rendered thereby, and the response of the public to such activities and/or service" (R. 20–21). By order of June 30, 1943 (R. 22–23), the Commission denied this petition on the ground that "the hearing issues now designated by the Commission are broad enough to permit, within reasonable bounds, the introduction of the evidence suggested by the proposed issues of the petitioner, and that the

requested amendment and enlargement of the hearing issues is therefore unnecessary."

Hearings were held in July, August, and September 1943, before a presiding officer designated by the Commission (R. 23, 39). On March 27, 1945, the Commission denied the application (R. 47). The grounds of the Commission's decision were that respondent could not be entrusted with the responsibilities of a licensee because of its continued concealment of facts and misreprentation in its applications and testimony before the Commission over a period of years (R. 35–38). The findings and evidence on the basis of which the Commission was enabled to reach this conclusion may be summarized as follows:[2]

I. The organization and ownership of the respondent

Respondent, WOKO, Incorporated, a corporation chartered under the laws of the State of New York (hereinafter referred to as WOKO) is a licensee of a radio broadcasting station in the City of Albany, New York (R. 23; Tr. 46, 47). Prior to November 1930, station WOKO was located first at Peekskill and later at Pough-

[2] In the following summary, record references (R. —) preceding the semicolon are to the Commission's findings, set out in the printed record, and the succeeding references (Tr. —) are to the evidence supporting the findings, set out in the administrative record transmitted to this Court as an original document.

keepsie, New York, and was licensed to Harold E. Smith and Raymond M. Curtis, co-partners, doing business as The Hudson Valley Broadcasting Company (R. 24; Tr. 47). The operation of the station at Poughkeepsie was a losing venture, and Curtis, unwilling to continue to pay his share of the losses, suggested that the station license be surrendered (R. 24; Tr. 49, 50). Smith, however, seeing the possibility of bettering the financial position of the station by securing a network affiliation for it, went to New York in the latter part of 1929 for that purpose. While in New York, he visited only the Columbia Broadcasting System (hereinafter referred to as CBS). (R. 24; Tr. 51.) At CBS, he approached Sam Pickard, who, from 1928 to 1929, had been a member of the Federal Radio Commission,[3] and, at the time of Smith's visit, was Vice President in charge of station relations for CBS (R. 24; Tr. 51–54).[4]

At their first meeting, Pickard advised Smith

[3] See R. 61.

[4] As such, Pickard was—to Smith's knowledge—entrusted by CBS with the duty of entering into contracts with broadcasting stations seeking affiliation with this network, when he deemed such affiliation advantageous to CBS. In this respect, it was Pickard's official duty to be helpful "to all stations and to build up a network," to discuss with the affiliates the question of bettering their frequencies, their hours, their location, etc. Pickard retained that position with CBS until 1936 and thereafter occupied an advisory position, on a part-time basis, with this network (Tr. 51–54, 157, 216, 218–220).

that CBS would not be interested in the station as long as it was located at Poughkeepsie, and suggested that it be moved to Albany and that authority also be secured to operate it full time. If this were done, he stated, CBS would be interested in having WOKO as an affiliate. (R. 24; Tr. 53.)

Smith was unable, and Curtis unwilling, to finance the contemplated move from Poughkeepsie to Albany. Accordingly, Smith, with Curtis' approval, went to Albany and conferred with a representative of The Press Company, Inc., which was the publisher of the Albany Evening News and the Knickerbocker Press, in order to interest The Press Company in giving financial assistance to the station if it should move to Albany. During this conference, the representative of The Press Company was informed of the conference with Pickard concerning possible Columbia affiliation and unlimited time operation. (R. 24–25; Tr. 54–57.)

After a second meeting in Albany between Smith and representatives of The Press Company, Inc., it was tentatively agreed that a corporation with 1,000 shares of capital stock should be organized, 250 shares to be issued and held as treasury stock subject to an option to purchase by The Press Company, and the remaining 750 shares to be isued in equal amounts to Smith and Curtis. It was agreed further that the proposed corporation should borrow $30,000 (later

increased to $35,000) from the National Commercial Bank and Trust Company at Albany, New York, on its corporate note endorsed by The Press Company, and that the Smith and Curtis stock should be held by The Press Company as collateral security for its endorsement. (R. 25; Tr. 54–67.)

During the course of these negotiations, Pickard was kept fully advised by Smith concerning all matters relating to the proposed move of Station WOKO to Albany. Following the tentative agreement with The Press Company, Smith received a preliminary contract dated August 12, 1930, and signed by Pickard as Vice President of Columbia, in which it was stated that Columbia service would be made available to Station WOKO, if and when it moved to Albany. (R. 25; Tr. 61, 66, 69, 70, Applicant's Exh. 2.)

At one of the many conferences held between Smith and Pickard, concerning the proposed removal of WOKO to Albany, and before the tentative agreement with The Press Company had been consummated in a final agreement, Pickard suggested to Smith that he, Pickard, be given an "interest" in the station. After some deliberation concerning the amount of this interest, it was agreed between Smith and Pickard in the latter part of 1929, or in the first part of 1930, that Pickard should be given a 24% interest (240 shares) in the contemplated corporate licensee,

Pickard to receive 14% of the shares, and Lawrence Lowman, another Vice President of CBS, to receive the remaining 10%. In "consideration" of this 24% interest in the corporation to be chartered, Pickard promised (1) to secure an affiliation contract between CBS and the station if and when it would be moved to Albany; (2) to furnish, without charge, experienced CBS engineers to assist in erecting the new station at Albany; (3) to help in obtaining studio space, and (4) to supply a good piano and also newspaper publicity at the time of the opening of the station at Albany. Smith testified that he informed Curtis of all details concerning his conferences with Pickard. (R. 25–26, 37; Tr. 77–87, 422, 429–430, 485.)[5]

When Pickard first asked that he be given shares in the prospective corporation, he expressed his desire that his interest in the corporation be not disclosed, saying that any disclosure would be "most embarrassing to him at the Columbia offices". Smith testified that he did not inquire into the reasons for his alleged (or real) embarrassment in case of disclosure because "after all Mr. Pickard was Vice President of CBS and a former member of this body", but that

[5] After the affiliation contract was executed, the services of the CBS engineers were furnished. However, it was then agreed between Pickard and Smith that WOKO would be given the piano in return for payment by the corporation for the newspaper publicity (R. 26; Tr. 437, 438).

he, Smith, had his "surmise". (R. 30–31; Tr. 115, 116, 228, 500–503.)

The Press Company was informed of Pickard's prospective interest in the station. Smith's arrangement with Pickard under which Pickard was to receive an interest in the station in return for his efforts in securing an affiliation contract with CBS was "perfectly agreeable * * * because they [The Press Company's representatives] thought it would materially aid and assist WOKO in establishing the Columbia contract. * * *" (R. 24–25; Tr. 82, 83, 485.)

The tentative agreement between The Press Company and Smith and Curtis was embodied in a written contract dated December 3, 1930, which, in turn, was superseded by an agreement between The Press Company and the respondent dated January 15, 1931. Incorporated on December 9, 1930, with Smith, Curtis, and the managing editor of The Press Company as incorporators and also the first directors, the respondent had an authorized capital stock of 1,000 shares without par value, of which 750 shares were issued to Smith and Curtis in equal amounts and 250 shares retained in the corporate treasury subject to The Press Company's option. Smith's and Curtis' shares were issued in certificates of 255, and, in order that the 240 shares could be conveniently endorsed to Pickard and Lowman, of 70 and 50 each. In fulfillment of Smith's agreement with

Pickard, Smith and Curtis turned over the 240 shares to Pickard and Lowman, endorsing 140 shares to Pickard and 100 shares to Lowman. (R. 26–27; Tr. 67–85). Pickard and Lowman deposited their shares with The Press Company, immediately upon endorsement to them, as part of the collateral for The Press Company loan to respondent. A formal affiliation agreement between WOKO and CBS was executed on December 18, 1931, after the 240 shares had been issued to Pickard and Lowman personally on October 23, 1931 (R. 26–28; Tr. 99, 100, 430, 431, 433).

The manner in which these transactions were carried on reflected the nature of the relationship existing between Pickard and the partners, Smith and Curtis. The latter feared that Pickard, once having been given the 24% of the prospective corporation's stock, might not procure the affiliation contract from CBS;[5] Pickard, on the other hand, was afraid that the partners might not give him the 24% as promised *after* he con-

[5] Smith testified as follows: "The Presiding Officer: Now, the attorney wants you to tell the Commission why it was that these original stock certificates were issued in the name of yourself and Mr. Curtis in place of being issued at that time to Mr. Pickard and Mr. Lowman. The Witness: Well, the answer is that the reason was that we were not going too far with this arrangement with Mr. Pickard until *we had positive assurance that we were going to secure a fulltime Columbia contract* * * * *I wanted to be assured of Mr. Pickard's good faith and good intentions.* * * * to give us a fulltime Columbia service in Albany" (Tr. 430, 433) (italics supplied).

tributed his share, *i. e.*, the affiliation contract (R. 28).[7] Therefore, it was agreed initially to issue the 24% in Smith's and Curtis' name, to endorse the certificates to Pickard and Lowman as evidence of their right, and then to deposit them with The Press Company pursuant to the terms of the loan agreement (R. 28; Tr. 99, 100, 430, 431).

Upon repayment of the loan by respondent in August, 1932, all of the stock held as collateral by The Press Company was delivered to the holders of record. A new certificate for the entire 240 shares was issued to Mrs. Pickard, since Lowman and Pickard had previously transferred their shares to Mrs. Pickard. She immediately endorsed the certificate over to Smith with an agreement between Smith and Pickard whereby Smith was to hold the stock for the Pickards. On February 2, 1933, a new certificate for 240 shares was issued in Smith's name, endorsed by him in blank and forwarded to Pickard on the same date.

[7] In this respect, Smith testified as follows: "A. The idea was that the certificates were to be endorsed and returned to The Press Company. Q. Were there any reasons in connection with that? A. Yes. Q. What were they? A. Because we had not as yet met our obligations with the bank and all this stock was still held in escrow. Q. Did they (Pickard and Lowman) make any requests of you that they wanted evidence of their stock? A. That is exactly the reason this last issuance was made. It was merely proof of Mr. Curtis and mine that The Press Company had good faith" (Tr. 99, 100).

Smith continued as holder of record of these shares until June 18, 1934, when, upon instructions from Pickard, the certificate was cancelled and three new certificates for 80 shares each were issued to Mrs. Pickard, the Esspick Corporation, and the Sampick Corporation, two holding companies controlled by the Pickards. These certificates, in turn, were surrendered on July 2, 1934, and a certificate for 240 shares issued in the name of R. K. Phelps, a brother-in-law of Pickard, in whose name the stock has remained; it has been so reported to the Commission continuously to the date of the hearing. (R. 26–29; Tr. 107–114, 117–121, 1191, 1195.)

After the respondent filed with the Commission its application for the renewal of its license, a member of the Commission's Law Department made an official visit to Station WOKO in December, 1942, and requested the permission of Smith to examine his correspondence with Mr. Pickard relative to the Phelps stock. A search of the files disclosed only a copy of a letter from Smith to Pickard found in the "Phelps" file. Smith maintained that he could "not recollect any particular correspondence." Thereafter, some such correspondence was found at various places and Smith produced part of it. The explanation offered by Smith concerning some of it being found at his home and not in the station's files was: That a Mr. Richardson was in charge of the filing; that

he (Smith) had received very little correspondence from Mr. Pickard; that he had been confined to his home by illness in 1938 and that such correspondence might have been referred to him there; or that on occasions letters from Mr. Pickard may have been carried home by him as they were of a personal nature; and that such letters were inadvertently not returned to the office. (R. 33–34; Tr. 1129–1136.)

II. The respondent's statements to the Commission

The evidence disclosed that in twenty-nine applications, filed with the Federal Communications Commission and its predecessor, the Federal Radio Commission, since 1931, the respondent misrepresented the ownership of the 24% stock interest as follows: Each application form requested information concerning all stockholders owning and/or voting 10% or more of the applicant's stock and the percentage of stock held by each. The earlier applications uniformly stated that 75% of the stock was owned by Curtis and Smith in equal shares and that the remaining 25% was either held in the treasury or by The Press Company. No mention was made in any of these applications of the fact that 240 shares, or 24%, of the stock had been assigned by Smith and Curtis to Pickard or his nominee. (R. 31–32; Tr. 251–253, Commission's Exhibit 1.) At the hearing, Smith admitted that representations

made to the Federal Radio Commission in various applications between October 23, 1931, and July 1934, and specifically in an application for renewal of license dated July 26, 1932, relative to the stock distribution of the applicant were not true (R. 31–32; Tr. 519–526).

The evidence showed further that on November 6, 1933, Smith testified at a hearing involving an application by WOKO for a modification of its license (Docket No. 1899). In response to a question as to who owned the stock of WOKO, Inc., he answered: "Harold E. Smith, 50%; R. M. Curtis, 25%, and The Press, 25%." On that date, however, the stock was held as follows: Curtis, 25½%, The Press Company, 25%; Smith 25½% in his own right and 24% as trustee for Pickard. Smith did not disclose the fact that Pickard was the beneficial owner of 24% of respondent's stock. Yet in the instant proceeding, Smith admitted that on February 2, 1933, he had endorsed in blank a certificate representing those 240 shares and had sent it to Pickard in whose possession it remained at the time of the hearing. Similar false testimony by Smith was given at other hearings also. (R. 33; Tr. 107–111, 488–496, 520, *et seq.*)

In the hearings involved in this case, Smith denied that he had knowledge of the fact that the Pickards were the beneficial owners of the 24% of the stock registered in the name of R. K.

Phelps since July 2, 1934, until Pickard so informed him in a letter dated June 15, 1942. However, evidence in the record consisting of correspondence between Smith and Pickard between the years 1934 and 1941, conclusively establishes that Smith did have knowledge of the identity of the actual owners. (R. 34–35, 37.) [8]

[8] Pickard's continuing contact with the affairs of the Corporation, as well as Smith's knowledge of the true ownership of the Phelps shares, is revealed by the following excerpts from the correspondence between Smith and Pickard, as set out in the Commission's findings (R. 34–35):

Smith to Pickard, 6/17/38, "At a director's meeting yesterday a dividend of $14.00 per share was declared. Enclosed is a check covering. While it may not pay off the mortgage on the old home, it ought to help a bit!" (Tr. 1292.)

Pickard to Smith, 10/8/38. "My chief worry is that we might lose CBS to a better station in that locality. I wonder if you and Curtis should go in and try to get our contract extended for a couple of years longer. If you want I will feel this situation out also." (Tr. 1295.)

Smith to Pickard, 10/12/38. "Of course, anything you can do to assist in connection with WOKO will be merely protecting your own interests as well as the corporation's." (Tr. 1293.)

Pickard to Smith, 7/7/39. "* * * As I recall, you have always been consistent with a dividend check about this time of year. * * * How about declaring out what you can spare? About all the small stockholders can do is to let out a little squawk occasionally. * * * You should think twice before spending beyond our capital reserve." * * * (Tr. 1301.)

* * * * * *

Smith to Pickard 12/29/39. "In regard to your stock now in the name of R. K. Phelps, as long as this matter has been placed before the Collector of Internal Revenue of Kansas City, don't you think it might be just as well to straighten

III. The Commission's conclusions and the subsequent proceedings

On the basis of these facts, the Commission concluded that since October 23, 1931, Sam Pickard or his wife, Francke Pickard, or both, or corporations which they controlled, were the real owners of 240 shares of the common stock of respondent, amounting to 24% of its capital stock; that the respondent misstated and concealed these facts

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the thing out at this end and transfer the stock to the name of Francke Pickard. * * *" (Tr. 1304.)

* * * * *

Smith to Pickard, 5/7/40, requesting Mr. Pickard's assistance concerning Columbia contract. "You can do a lot in this situation and I urge you to give us your help, in self interest, and for the sake of the station." (Tr. 1321.)

Pickard to Smith, 5/17/40. "I have a substantial interest in the business and naturally feel it a constant loss not having the opportunity to see you more often and learn more intimately what is going on. I am glad to see our statements reflecting improvement and hope that we can soon be out of debt as I feel that in these times a large back-log of reserve is essential." (Tr. 1320.)

Smith to Pickard, 5/21/40. "You mention your substantial interest in the affairs of WOKO. That is quite correct and applies as well to Raymond Curtis, The Press Company, Inc., and myself." (Tr. 1316.)

Smith to Pickard, 1/2/41. "At the annual directors meeting a dividend of $27.50 per share was declared, payable January 2, and I am enclosing a check for $6,400. Have you been able to do anything in regard to the transfer of WOKO stock? With the Commission tightening up its regulations and inquiring into every last detail, I feel very strongly that this matter should be taken care of without further delay." (Tr. 1327.)

in its reports to the Commission and to its predecessor, the Federal Radio Commission, in violation of Section 10 of the Radio Act of 1927, Section 308 (b) of the Communications Act of 1934, and the rules and regulations of both Commissions; that the performance of its statutory duties requires that the Commission have full information about each of an applicant corporation's stockholders, and that the failure to disclose that the Pickards were stockholders in respondent prevented a determination of their qualifications and fitness under the Communications Act; that this concealment was not inadvertent but was wilful, and that there was no basis for concluding that the directing officers of the respondent corporation did not know the identity of the real owner of the stock listed and reported as owned by R. K. Phelps (R. 35–37). The Commission, therefore, concluded that respondent could not be entrusted with the responsibilities of a station licensee and that a grant of its application for renewal of license would not serve the public interest, convenience, or necessity (R. 38). Accordingly, an order was entered denying the application for renewal of the license (R. 47).

In an opinion and order dated April 24, 1945, the Commission granted, upon respondent's application, a special temporary authorization for the continued operation of WOKO until May 2, 1945 (R. 51–52). On April 28, 1945, respondent filed a petition for rehearing (R. 52–57) which

was denied on May 1, 1945 (R. 58). Respondent has been operating WOKO since that time on special temporary authorization.

On May 21, 1945, respondent took an appeal from the order of the Commission denying its application for renewal of license to the United States Court of Appeals for the District of Columbia (R. 1–7). On January 21, 1946, a divided court reversed the order of the Commission. Mr. Justice Wilbur K. Miller delivered the opinion of the court, in which Mr. Justice Prettyman concurred (R. 59–72). Chief Justice Groner dissented in a separate opinion (R. 72–73).

SUMMARY OF ARGUMENT

I

The Communications Act authorizes the Commission to refuse to renew a license because of repeated concealments and misrepresentations made by a licensee to the Commission. Section 308 of the Communications Act requires that all applicants for a license or renewal shall be in writing and must be sworn to by the applicant, and indicates that one of the purposes to be served by such a written application is to enable the Commission to give consideration to the character of an applicant. Under Section 312 (a) of the Act, the Commission is given authority to revoke any station license for false statements in the application or in other statements of fact

required by the Commission pursuant to Section 308 (b). Section 307 (d) of the Act makes it clear that the importance of these elements is undiminished where application is made for renewal of a license previously granted. These provisions of the statute demonstrate that the fact that wilful concealments and misrepresentations might also be criminally punishable does not bar the Commission from considering such conduct as a relevant factor in a license renewal proceeding.

It is necessary that the Commission be able to rely upon the truth of representations made to it. Consequently, there is no merit to the suggestion of the court below that there was some impropriety in the Commission's failure to make findings as to what action it might have taken had it known the truth, and as to how the misstatements influenced the Commission in the exercise of its licensing power. Moreover, an inquiry along the line suggested by the court below would be totally irrelevant to the question of the character of the applicant. Since the concealment of information is a sufficient basis for agency action terminating a license, there is no necessity for inquiry as to what effect the concealed information might have had if it had been made available to the agency.

Nor can error be attributed to the Commission on the ground that it failed to find that two of

the four stockholders, who were also among the first directors of WOKO, knew that the general manager, Smith, was withholding information from the Commission. The Commission found that it "would be credulous indeed to accept without question representations that the directing officers" of WOKO did not know that Pickard was the real owner of a 24% interest in WOKO "reported as owned by R. K. Phelps over an eight-year period," and, pointed to circumstances from which it could be concluded that they knew of the deceptions. More fundamentally, however, a finding on this question was unnecessary, for the innocence of particular stockholders cannot absolve the corporation from responsibility for wrongful acts of the corporation's managing officer.

In the light of these considerations, it was reasonable for the Commission to conclude from the undisputed findings of persistent and wilful misstatements and concealments of facts essential to full consideration by the Commission of the applicant's qualifications, that the respondent was unfit to be entrusted with the responsibilities of a licensee.

II

The court below erred in holding that the Commission was required to make findings concerning respondent's program service, the value of its property, and other factors before reaching a

conclusion as to whether or not a renewal of respondent's application would be in the public interest. There is nothing in the Communications Act to suggest that the Commission must make findings on all of the numerous factors which may be within the scope of the criterion of the public interest when is it able to reach a conclusion on the basis of its finding on one or a limited number of factors that the grant of a license would not be in the public interest. And when the Commission is able to conclude on the basis of its findings with respect to a single factor that the grant of a license would not be in the public interest, it is authorized to deny the application on that ground.

Whether such factors as the adequacy of program service require consideration by the Commission in reaching a determination whether an application for renewal should be granted or denied depends on the facts of the particular case and the judgment of the Commission with respect to those facts. A misstatement or a series of misstatements to the Commission may be so serious as to justify the Commission without more in denying renewal of license. If the Commission is doubtful as to whether the misrepresentations alone indicate a lack of essential qualification for a licensee then it is within the Commission's power to consider other factors. But the mediocrity, adequacy or excellence of a station's

program service cannot serve to make a trivial misstatement serious or a grave falsification a matter of no consequence.

Moreover, the specific value of a licensee's assets which would be adversely affected by a refusal to renew the license can have no bearing on a determination whether he has engaged in conduct warranting such refusal. Sections 301, 304, 307 (d) and 309 (b) of the Act define the limited interest created by a license and make it clear that a licensee can acquire no right to the use of a frequency paramount to the federal regulatory authority. Dishonesty cannot be mitigated by the fact that the guilty party's assets are large.

In holding that the Commission's decision was arbitrary and capricious for the reason that it constituted a departure from previous Commission decisions, the court below has misinterpreted the previous decisions of the Commission and has, moreover, improperly applied the doctrine of *stare decisis* to the Commission's determinations. The courts have consistently held that the doctrine of *stare decisis* is not applicable to administrative determinations.

ARGUMENT

This case involves no question concerning the sufficiency of the evidence to support the findings made by the Commission. The court below

found—and the respondent in its argument made no contention to the contrary—that the evidence supports the Commission's finding that the respondent made repeated concealments and misrepresentations to the Commission concerning a substantial minority interest in the respondent corporation (R. 62–63). This concealment was not the result of any inadvertance, nor was it an isolated incident; carried on for a period of approximately twelve years, it was plainly wilful. Indeed, in this very proceeding, the respondent's general manager testified falsely. See *supra*, pp. 15–16. On this ground, the Commission concluded that the respondent could not be entrusted with the responsibilities of a licensee and that a grant of a renewal of its license, therefore, would not serve the public interest.

The court below held that the Commission "acted arbitrarily in proceeding from its warranted conclusion that the stock ownership had been misrepresented to it, to the drastic decision that the continuance of the license would not be in the public interest." (R. 72). The court based this conclusion on the ground that the making of false statements or concealment of facts is not in itself an adequate ground for finding that an applicant cannot be entrusted with the responsibilities of a licensee but that the Commission is required to weigh other factors such as the quality of respondent's program service and the value of

the property involved (R. 71–72). This holding completely misconstrues the provisions of the Communications Act and results in a substitution of the judgment of the court below for that of the Commission on a matter entrusted to the Commission for determination.

I. The Communications Act authorizes the Commission to refuse to renew a license because of a licensee's repeated and wilful concealments from, and misrepresentations to, the Commission

Provision for renewal of licenses upon expiration of the license period is contained in Section 307 (d) of the Communications Act. Appendix, *infra*, pp. 54–55. That Section provides that "action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications." The nature of some of the considerations which Congress intended to be passed upon by the Commission is clearly indicated by the provisions of Section 308. Appendix, *infra*, pp. 55–56. Section 308 (a) requires that all applications for license or renewal shall be in writing, and Section 308 (b) provides that the application "shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, *character*, and financial, technical, and other qualifications of the

applicant to operate the station."[9] (Italics supplied.) This subsection contains the further provision that:

> The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

These provisions of Section 308, relating to the requirement of a written application and the authority conferred on the Commission to require additional statements of fact from licensees and applicants, are closely related to the provisions

[9] Sec. 3.24 of the Commission's regulations, 47 C. F. R. (Cum. Supp.) 3.24, reflect this provision by specifying that the character of the applicant is an element to be considered in determining whether a license should be granted. It states that:

"An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:

* * * * *

"(d) That the applicant is legally qualified. That the applicant (or the person or persons in control of an applicant corporation or other organization) is of good character and possesses other qualifications sufficient to provide a satisfactory public service."

* * * * *

of Section 312 (a) of the Act, Appendix, *infra*, pp. 57–58, which provides in part that:

> Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of facts as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application * * *.

A review of the licensing provisions of the Communications Act thus reveals the close interrelationship of three provisions: The requirement of a written application for a license and a renewal of license (Sec. 308 (a)); the indication in Section 308 (b) that one of the purposes to be served by such an application is to enable the Commission to give consideration to the character of an applicant; and the authority granted to the Commission by Section 312 (a) to revoke any station license for false statements in the application or in other statements of fact required by the Commission pursuant to Section 308 (b). By these provisions, the Act gives express recognition to the importance to the Commission for the exercise of its licensing functions of a written application, the truthfulness of the applicant's responses, and the good character of the applicant. The Act also makes clear that the

importance of these elements is undiminished where application is made for the renewal of a license previously granted.

While it is true, as the court below stated (R. 71), that the denial of a renewal of a license because of the applicant's concealments and misrepresentations cannot be justified as a penalty for making false statements, since punitive sanctions for such violations of the Act and the Commission's rules and regulations are exclusively afforded, after trial and conviction, by Sections 501 and 502 of the Act, Appendix, *infra*, pp. 58–59, this fact does not detract from the power of the Commission in the conduct of its licensing functions. A refusal to renew a license because of misconduct related to the privilege conferred does not constitute a penalty in the same sense as the imposition of a fine or imprisonment. That very issue was considered in the case of *National Broadcasting Company* v. *United States*, 319 U. S. 190, 222–223, in which this court held that the fact that conduct of a licensee may be violative of and punishable under the provisions of the anti-trust laws, does not bar the Commission from considering such conduct in a licensing proceeding when it is relevant to a determination of whether the party engaging in such conduct would be a fit licensee. Cf. *Helvering* v. *Mitchell*, 303 U. S. 391, 399; *Steuart & Bro.* v. *Bowles*, 322 U. S. 398, 404–407.

Other administrative agencies have consistently held that the concealment and misstatement by an applicant or licensee of facts necessary to the licensing agency for the proper exercise of its licensing and regulatory functions are sufficient grounds for a denial of an application for a license.[10] The courts have reached the same result in passing upon administrative action in denying an application for a license,[11] or suspending or revoking an outstanding license.[12]

[10] Department of Agriculture: *In re Bessie Silverfarb*, 3 A. D. 880; Civil Aeronautics Board: *Hassan Ali Easmeil*, Docket No. SR–1056 (Mar. 27, 1945); Interstate Commerce Commission: *Burbridge Common Carrier Application*, 14 M. C. C. 412; *Federal Storage Warehouses, Inc.*, 43 M. C. C. 673; Office of Price Administration: *In the Matter of Tramor Cafeteria, Inc.*, 3 OPA Op. and Dec. 6215; *In the Matter of Maynard Wood*, 3 OPA Op. and Dec. 6220; *In the Matter of Mark C. Bloome*, 3 OPA Op. and Dec. 6208; Securities and Exchange Commission: *In the Matter of Securities Exchange Corporation*, 2 S. E. C. 760; *In the matter of Charles P. Rogers*, 3 S. E. C. 597; *L. P. Atwater*, 3 S. E. C. 763; *In the Matter of Mine Sales, Inc.*, 5 S. E. C. 574.

[11] *Doran* v. *Judd*, 31 F. 2d 108 (C. C. A. 3); *Bernstein* v. *Doran*, 33 F. 2d 897 (C. C. A. 3); *National Grain Yeast Corporation* v. *Mitchell*, 51 F. 2d 560 (C. C. A. 3); *Wynne* v. *Romonat*, 46 F. 2d 29 (C. C. A. 3); *Newark Bay Cereal Beverage Company* v. *Wynne*, 57 F. 2d 83 (C. C. A. 3); *Great Western Broadcasting Association, Inc.* v. *Federal Communications Commission*, 94 F. 2d 244 (App. D. C.); *Middlesboro Liquor and Wine Company* v. *Berkshire*, 133 F. 2d 39 (App. D. C.); *Thomas J. Molloy & Co.* v. *Berkshire*, 143 F. 2d 218 (C. C. A. 2); *Roumanian American Winery V. Morgenthau*, 152 F. 2d 452 (C. C. A. 2).

[12] *Higgins* v. *Mills*, 22 F. 2d 913 (C. C. A. 2); *Archer* v. *Securities & Exchange Commission*, 133 F. 2d 795 (C. C. A.

It is evident that the Commission can properly exercise its licensing and other functions only if it receives adequate and truthful information from applicants and licensees. There are approximately 1000 standard broadcast stations presently licensed by the Commission, and, in the near future, there will be hundreds of television stations and several thousands of frequency modulation stations. Licenses for all of these stations have been or will be authorized to a great extent upon the basis of a showing made in applications. Renewals are granted on the same basis. If a detailed investigation were required to determine the accuracy of the representations contained in each of the thousands of applications received annually, an intolerable burden would be imposed upon the Commission. Such a requirement would seriously impede, if not prevent its normal operations.[13] It is, therefore, necessary for the Commission to rely on the truth of the representations made to it. This factor, in itself, justifies an insistence by the Commission upon complete honesty by applicants, and demonstrates that a finding

8); *Talbert* v. *Sims*, 143 F. 2d 958 (C. C. A. 4); *Levers* v. *Anderson*, 153 F. 2d 1008 (C. C. A. 10).

[13] On the basis of information gathered for the forthcoming annual report of the Commission for the fiscal year ending June 30, 1946, it appears that during that year, 3,238 applications for broadcast facilities were processed. In addition, there were many thousands of applications for authorizations in the other radio services, such as aviation, maritime, police, fire, etc.

of untrustworthiness in the dealings of an applicant with the Commission is sufficient to justify the further finding that the applicant does not have the good character which is essential for a licensee if the radio system is to be operated in the public interest. In upholding the Commission's denial of an application for a license on the ground that the applicant had made a false disclosure and had also made false statements, the court below, in *Great Western Broadcasting Association, Inc.*, v. *Federal Communications Commission*, 94 F. 2d 244, 246, remarked that:

> Undoubtedly the act contemplates that the applicant for a license shall establish those qualifications for the license which would make its grant serve the public interest, and this necessarily presupposes a frank, candid, and honest disclosure of the facts as to its qualifications deemed by the commission essential to enable the commission to act within its powers.

In this case, however, the court below was of the opinion that the Commission was not warranted in resting upon respondent's concealments and misrepresentations as a ground for denying a renewal of license because, as stated in the opinion (R. 63), "The Commission did not find that this concealment of fact had influenced it in making any decision throughout the years involved, nor did it find that it would have acted in any manner differently from the way it did act

on the various applications for renewal of license, had it known that the Pickards were the beneficial owners of these shares of stock." Indeed, the court went on to say that the Commission could not have found that the Pickards were disqualified in any way to own shares in respondent because there is no evidence upon which such a finding could be based (R. 71).

To require the Commission to decide whether the information, if revealed, would have caused it to act differently than it did, would be to demand an inquiry into an issue which is of no relevance to the determination of the applicant's qualifications as a licensee. An applicant's character could hardly be deemed more acceptable simply because its misstatements, wilful and continued, might not have influenced the Commission in acting upon its earlier applications. What is decisive is that the misrepresentations, in and of themselves, so reflect upon the applicant's fitness to operate a station in the public interest as to warrant the Commission in refusing to renew its license. Moreover, application of the restrictive rule laid down by the court below would go far to destroy the effective authority of administrative agencies to require the furnishing of truthful information. No such requirement has been imposed in comparable situations. Thus it has been held that the failure to keep records or refusal to permit inspections is sufficient ground

for revocation of a license even though it is not shown that the failure or refusal was for the purpose of concealing an actual violation. *Burns* v. *Doran*, 37 F. 2d 484 (C. C. A. 3); *DeLuca* v. *Stone*, 45 F. 2d 846, 848 (D. Md.). Even in criminal prosecutions for wilful misstatements of facts to government agencies, no showing is necessary that the agency was, in fact, misled by the false information. *Kay* v. *United States*, 303 U. S. 1; cf. *United States* v. *Presser*, 99 F. 2d 819, 822 (C. C. A. 2). In the *Kay* case, this Court observed (303 U. S. at 5–6) that "It does not lie with one knowingly making false statements with intent to mislead the officials of the [Government] Corporation to say that the statements were not influential or the information not important."

It may readily be admitted that before the Commission can properly deny an application on the basis of misstatements, it must, of course, determine whether the misstatements are so serious and were made under such circumstances as to warrant a conclusion that the applicant cannot be entrusted with the responsibilities of a licensee. It might well be unreasonable for the Commission to reach such a conclusion on the basis of isolated and insignificant misstatements, or ones resulting from inadvertence or misunderstandings. But such a judgment must be made by the Commission in the light of the nature of

the misstatements, their seriousness, and the circumstances under which they were made.[14]

In its decision, the Commission pointed out the necessity of having full information about each of an applicant corporation's stockholders in order to enable it to give consideration to the character, background, and training of all parties having an interest in the proposed license, in the discharge of its statutory duty to pass upon the qualifications of applicants (R. 36). And it concluded that "The failure in this case to disclose that the Pickards were stockholders in WOKO, Inc., prevented a determination of their qualifications and fitness under the Communications Act." (R. 36). The Commission also found that the concealment was wilful (R. 36), and noted that general manager Smith had even testified falsely in the hearing in the instant case (R. 33, 37). In the light of the authorities discussed above, these findings provided an ample basis for the

[14] This is indeed the approach which the Commission has adopted, as is illustrated by its decision in *Buffalo Broadcasting Corporation*, 10 F. C. C. — (decided December 19, 1945), cited by respondents (Br. in Opp. 9, 14, 16). In that case, the Commission found that the failure of the licensee to make full disclosure in its reports to the Commission of certain agreements with a third party indicated a lack of candor and care in the preparation of the reports. The Commission concluded that these omissions were not so serious as to require a denial of the application for renewal, particularly in view of the fact that one of the basic agreements involved had been filed with the Commission's predecessor, the Federal Radio Commission.

Commission's conclusion that the application for renewal should be denied. It was plainly unnecessary for the Commission to make findings as to whether or not the Pickards were disqualified in any way to own the shares of stock involved. The observation of the court below that the Commission could not have found that the Pickards were disqualified therefore has no relevance to the disposition of the appeal. Moreover, had it been necessary to pass on this question in this proceeding or had the full facts been disclosed to it in previous applications, the Commission, with its expert knowledge of the field of radio and the significance of the relationships between stations and networks, could well have come to a conclusion contrary to that reached by the court.

The record discloses that Pickard, then vice-president of Columbia Broadcasting System in charge of station relations, received the stock interest in respondent as consideration for doing an act which he was under a duty to his employer to perform if it were in the best interests of the Columbia Broadcasting System. There was, therefore, ample basis for a conclusion that Pickard was not a person of good character, since he had betrayed his employer's trust in him in the acquisition of his stock interest in respondent. Of even greater significance, however, was the bearing of Pickard's conduct on the important subject of the relationships between network organiza-

tions and independent radio stations. That these relationships may have vital bearing on the public interest is amply shown in the *Network* cases, *Columbia Broadcasting System, Inc.,* v. *United States,* 316 U. S. 407, and *National Broadcasting Company* v. *United States,* 319 U. S. 190. The securing and awarding of network affiliation contracts by a species of commercial bribery is clearly not conducive to fair competition in the creation of network affiliations. Moreover, the securing by a network official of interests in local stations, by means of abuse of his power to award network affiliation contracts, creates the danger of an undue concentration of control of a most sinister kind.

The Commission did not make these findings; it could not have, prior to 1943, with the relevant facts concealed from it. And after discovering the long-standing imposition upon it by concealments and misstatements, it was unnecessary for the Commission to make findings as to what it might have done had it known the truth. As Chief Judge Groner observed in his dissenting opinion, "What, if anything, would have happened if the truth had been disclosed is, in my view, not material" (R. 72). It was sufficient for the Commission to find that wilful misstatements and concealments of fact had occurred, and that by its conduct over so long a period of time the respondent had demonstrated that it could not be trusted.

The court below suggests in its opinion (R. 63, 66) that the Commission's action was improper because there is no finding that Curtis and The Press Company had any knowledge of Smith's concealment of Pickard's interest. Indeed, the court went so far as to make a finding that they had no such knowledge, although it admits that both Curtis and The Press Company knew of the original issuance of 240 shares to Pickard. It is true that the Commission itself made no affirmative finding that Curtis and The Press Company knew of the acts of misrepresentation made on behalf of the respondent corporation by Smith, its general manager. It stated, however, that it "would be credulous indeed to accept without question representations that the directing officers of the applicant corporation did not know the identity of the real owner of the stock listed and reported as owned by R. K. Phelps over an eight year period from 1934 to 1942" (R. 37), and pointed to the existence of circumstances from which it could be concluded that Curtis and The Press Company did know of the deceptions. Thus, as to Curtis, it noted that he was the President and a director of respondent, had been long associated with Smith, and knew of the manner in which Pickard obtained his interest in WOKO (R. 37). Moreover, the capital structure of the corporation was so arranged that Curtis and Smith should have the controlling interest in respondent (R. 25–26).

There was thus no basis in the record upon which the Commission could "notice the innocence of Curtis" as the court did (R. 66).

So far as The Press Company is concerned, the circumstances that the respondent was a closely held corporation in which The Press Company held a twenty-five percent stock interest (R. 26); that The Press Company's managing editor was a member of WOKO's board of directors (R. 26); that it knew of the original issuance of stock to Pickard; and that Phelps never participated in the corporation's affairs (R. 37), were certainly enough to show that the court below had no basis for its own finding that The Press Company had no guilty knowledge.

A more fundamental consideration, however, is the recognition that there was no need for the Commission to find that Curtis and The Press Company had specific knowledge of the misstatements. The Commission here found that general manager Smith knew the falsity of the statements made to the Commission and had even testified untruthfully in the instant proceeding. Certainly, the acts of the respondent's responsible officer, authorized by the stockholders to act for it, were necessarily the acts of the respondent itself. There are numerous acts which the authorized representative is in a position to do

which may result in imposition of fines or penalties on the corporation or even forfeiture of the corporate charter, despite the innocence of the stockholders. Generally, the protection of the stockholders lies in choosing men of integrity to act for them, and in supervising their conduct so far as it is possible to do so. Should the value of their investment be lost by some unauthorized impropriety of their representative, they would have a remedy by way of an action for damages against him.

In the perspective of these considerations, it was reasonable for the Commission to conclude, from the undisputed findings of persistent misstatements and concealments in its dealing with the Commission, that respondent was unfit to be entrusted with the responsibilities of a licensee and that a grant of the application for renewal of license for the operation of WOKO by respondent would not serve the "public interest, convenience, or necessity," the basic standard Which the Commission must apply under the Act. Section 309 (a), Appendix, *infra*, p. 56. These are the very types of judgment which are entrusted to administrative discretion by a grant of licensing authority to be exercised in the light of the criterion of the public interest, convenience, or necessity. *Cf. Ma-King Co.* v. *Blair*, 271 U. S.

479, 482. For it is in the conclusions to be drawn from the facts no less than in the finding of the facts that the judgment and expert knowledge born of continuing contact with the particular subject matter ripen and come to fruition. On that ground, this Court has been reluctant to impose its own particularizations of broad statutory criteria for administrative action on the agencies, but has been content to hold that a "sensible exercise" of administrative judgment in applying statutory criteria of such breadth would be left undisturbed. *Gray* v. *Powell*, 314 U. S. 402, 413. See also *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125; *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 145–146; *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111. See Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis* (1944), 58 Harv. L. Rev. 70, 102–103.

That such a latitude is properly to be accorded by reviewing courts to the Commission in the exercise of its licensing powers is manifest from the legislative history of Section 402 (e) of the Communications Act, providing for judicial review of licensing determinations of the Commission exclusively by the Court of Appeals for the District of Columbia. As originally enacted, Section 16 of the Radio Act of 1927, 44 Stat. 1169, provided in part that, on appeals from licensing decisions of the Federal Radio Commission, the

Court of Appeals for the District of Columbia was empowered to "alter or revise the decision appealed from and enter such judgment as to it may seem just." In *Federal Radio Commission* v. *General Electric Company*, 281 U. S. 464, 467, this Court held that this provision made the Court of Appeals "a superior and revising agency" in the administrative field and consequently that its decision was not a judicial judgment reviewable by this Court. In the light of this decision, Congress amended Section 16 of the Radio Act of 1927, by the Act of July 1, 1930, C. 788, 46 Stat. 844, to provide "That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious." As amended, Section 16 (d) was carried over without change into Section 402 (e) of the Communications Act. Appendix, *infra*, p. 58.

II. The court below erred in holding that the Commission was required to make findings concerning the respondent's program service, the value of its property, and other factors

The court below held (R. 66–68, 70) that, admitting the concealments and false statements made by respondent, the Commission could not deny a license on that ground without considering the quality of respondent's program service, the value of the radio property, and similar fac-

tors. This, however, confuses the nature of the inquiry which must be made as a basis for a grant of a license with the extent of the findings which will suffice as a basis for denial when inquiry has proceeded sufficiently to reveal the want of an essential qualification.

The Communications Act of 1934 does not prescribe specifically the findings which must be made by the Commission to support a conclusion that an application for renewal should be denied. It simply provides that the Commission shall not issue a license or renewal unless it is able to determine that the public interest, convenience, or necessity would be served thereby. The Act does not in any way provide that the Commission must make findings on all of the numerous factors which may be within the scope of the criterion of the public interest, when it is able to reach the conclusion on the basis of its findings on one or a limited number of factors that the grant of a license would not be in the public interest. The Commission, in order to reach a conclusion that an application should be granted, must be able to determine that the applicant is qualified in all respects and that there appears nothing adverse to applicant which would warrant a conclusion that a grant would not be in the public interest. When, however, the Commission is confronted with such an adverse factor, and is able to conclude that, because of it a grant would not

serve the public interest, it would be wasteful and fruitless to require the Commission to go on to catalogue all the respects in which the application was otherwise meritorious and not deficient. The Act itself imposes no such requirement nor can the requirement that the Commission's licensing powers be exercised in the light of the public interest, convenience or necessity be so construed.

This is made clear by the decisions of this Court in the *Network* cases, *Columbia Broadcasting System, Inc.*, v. *United States*, 316 U. S. 407, and *National Broadcasting Company* v. *United States*, 319 U. S. 190. These cases involved the validity of certain regulations of the Commission in which it announced that no license would be granted to any station holding a network affiliation contract containing specified features which the Commission found to be contrary to the public interest. This Court, in passing upon the reviewability of these regulations in the case of *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 418, observed that "the regulations are rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the grounds specified in the regulations without more." The validity of these regulations was upheld by this Court after review upon the merits in the subsequent case of *National Broadcasting Company* v. *United States*, 319 U. S. 190.

The court below has also held that where the Commission finds that one or two grounds provide a sufficient basis for the denial of a license, it need not consider other factors which might be pertinent had the grounds rested upon presented no insurmountable obstacle. *Simmons* v. *Federal Communications Commission,* 145 F. 2d 578 (App. D. C.). In the *Simmons* case, the court below held that the Commission properly rested a denial of an application on the grounds that the proposed antenna site was unsuitable and that the proposed station would cause objectionable interference with existing stations. The court held that the Commission was not required to make findings on other issues. See also *Greater Kampeska Radio Corporation* v. *Federal Communications Commission,* 108 F. 2d 5 (App. D. C.)

It is, of course, true that the adequacy of the program service rendered by the applicant for renewal of his license and other similar factors may be relevant to a determination of whether renewal of the license meets the standard of public interest, convenience and necessity. But whether such factors are relevant—in the sense that the Commission should consider them—depends on the facts of the particular case and on the judgment of the Commission with respect to those facts. A misstatement or series of misstatements to the Commission may be so serious

as to justify the Commission, without more, in denying renewal of the license. Unless the judgment of the Commission in this respect is arbitrary or capricious its decision must stand.

It may on occasion be appropriate for the Commission to consider other factors. If the Commission is doubtful as to whether the misrepresentations alone indicate a lack of essential qualifications for a licensee, then it is within the Commission's power to consider other factors. But, here again, it is the Commission's judgment as to whether the misrepresentations are in that doubtful class which must control. And, the mediocrity, adequacy, or excellence of the station's program service cannot serve to make a trivial misstatement serious, or a grave falsification a matter of no consequence. The record in this case shows plainly that the conclusions of the Commission as to the seriousness of the misrepresentations were wholly reasonable.

Moreover, the specific value of a licensee's assets can have no bearing on a determination whether he has engaged in conduct which would warrant the Commission in refusing him a renewal of license. Indeed, differences in treatment based on whether the station's assets are worth $3,000 or $300,000 would be repugnant to every consideration of fairness and equal treatment. In addition, in a case where the denial is otherwise proper and within the Commission's

authority, any approach which is based on the view that denial of a renewal of a license would destroy valuable property rights of the licensee is expressly barred by the provisions of Sections 301, 304, 307 (d), and 309 (b) of the Communications Act, Appendix, *infra*, pp. 53–55, 56–57, which define the limited interest created by a station license and make it clear that a licensee can acquire no right to the use of a frequency paramount to the regulatory power of the United States, which under the Communications Act has been delegated to the Commission by Congress. See *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 282; *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 475, and *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327.

As this Court pointed out in the *Nelson Brothers* case, *supra*, and in the *Pottsville* case, *supra*, those who make investments in radio broadcasting stations do so in the light of, and subject to, the Federal regulatory authority, and these investments cannot therefore operate to foreclose or curtail any proper exercise of that authority. The inevitable consequence of any Commission determination that the conduct of a licensee is in such substantial violation of the Act as to warrant a denial of a renewal of the license, is to impair the value of the licensee's assets so far as they are dependent upon the use of a

frequency. It would be manifestly absurd to say that this inevitable consequence of a denial is a factor which operates to curtail the Commission's authority to determine when a denial is appropriate. The value of the assets involved cannot therefore be a criterion for determining whether misstatements or other conduct in violation of the Act and the Commission's regulations are so serious as to warrant a denial.

The court below was of the opinion (R. 68–69) that the Commission's action in the instant case, in refusing respondent a renewal of its license because of its concealments and misrepresentations, was arbitrary and capricious for the reason that such action constituted a departure from the course which the Commission had taken in dealing with misstatements in applications in other cases in which other factors were taken into account. The court, however, has misinterpreted the Commission's decision. Those cases simply stand for the proposition that, in passing upon the seriousness of a licensee's conduct in making misstatements to it, the Commission will examine the particular situation and determine whether any mitigating or exonerating circumstances are present, and give due weight to these.[15] None of the Com-

[15] In *Navarro Broadcasting Association*, 8 F. C. C. 198, cited by the court below, a majority of the Commission found mitigating circumstances in the fact that the parties directly responsible for the concealment had wholly relinquished their interest in the station over two years prior to the issuance of

mission's decisions relied upon the court below can therefore be construed as in any way binding the Commission to consider the quality of program service rendered by a licensee or the value

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the order of revocation, that the parties remaining as licensees of the station had acquiesced in the concealments at a time when they were new and inexperienced in the field of broadcasting, and that the subsequent conduct of the licensee demonstrated to the Commission that they could be entrusted with the responsibilities of a licensee. It is thus clear that, in the *Navarro* case, the Commission rested its decision on the ground that the licensees had so rehabilitated themselves as to give the Commission assurance that they could be trusted with the responsibilities of a licensee. The Commission did not decide that the license should not be revoked because that would deprive the community of service, or because the licensees had been rendering an adequate service, but rather because the licensee could now be trusted, and should therefore be permitted to continue to render the adequate radio service it had theretofore given the community. One Commissioner dissented. *Red Lands Broadcasting Association, et al.*, 8 F. C. C. 473, involved the same parties as in the *Navarro* case and the Commission reached the same result.

In the case of *Panama City Broadcasting Company*, 9 F. C. C. 208, also cited by the court, a bare majority of the Commission found mitigation in the fact that the acts of concealment had been committed by agents without specific direction from the respondent licensee. It also felt that special circumstances were presented by the fact that the community would be deprived during wartime of the service of the only existing station rendering primary service to the area. For, during the war period, the Commission did not grant construction permits for new stations in areas already receiving primary service from other stations. See 9 F. C. C. at 219, 353, 356. Three Commissioners dissented on the grounds that they could not find mitigating circumstances, and that they could not share the majority's concern that the community would be long without radio service in wartime if the order of revocation were made final.

of its investment before refusing to renew a license because of repeated concealments and misrepresentations.[16]

Moreover, even if it be assumed *arguendo* that the court below has not misinterpreted the Commission's earlier decisions, the holding that the Commission cannot depart therefrom, "except for most cogent reasons", results in subjecting the Commission's determinations to a most stringent

[16] The court below also deduced (R. 69–70), from reading the Commission's decisions referred to, that, under those decisions, the Commission was required to grant respondent's petition for rehearing. This petition (R. 54) proposed a reorganization of the licensee so as to enable it to "become qualified to hold a license and entitled to a renewal of the license heretofore granted to the corporation." It requested an opportunity to present evidence in support of its plan of reorganization and "such other and further relief in the premises as the Commission shall deem just and proper" (R. 57).

Section 405 of the Communications Act, governing petitions for rehearing, provides that the Commission may, in its discretion, grant a rehearing if sufficient reason therefor is made to appear. Respondent's petition for rehearing did not suggest any error in the Commission's findings of fact or conclusions, nor did it allege that respondent would adduce any new evidence to show that a grant of its application for renewal of license would serve the public interest, convenience, or necessity. Instead, it sought either to transfer control of respondent to various unidentified persons or to apply in their behalf for the facilities of WOKO. The Communications Act and the Commission's rules provide proper procedures to achieve both results. Certainly it cannot be contended that the Commission abused its discretion in denying a petition for rehearing which was not addressed to the matter under consideration but merely sought to raise questions which could be considered more appropriately in other proceedings.

and unusual doctrine of *stare decisis*, even though the court disclaims doing so (R. 68). Even courts are not so bound by the *stare decisis* doctrine as to make decisions departing from earlier rulings subject to castigation as arbitrary and capricious for that reason alone. Furthermore, the courts have consistently held that the doctrine of *stare decisis* is not applicable to administrative determinations. *Northern Pacific Railway Company* v. *United States*, 41 F. Supp. 439, 446 (D. Minn.), affirmed, 316 U. S. 346; *Virginian Railway Company* v. *United States*, 272 U. S. 658; *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268; *Shawmut Ass'n* v. *Securities and Exchange Commission*, 146 F. 2d 791, 796 (C. C. A. 1); *Virginia Stage Lines* v. *United States*, 48 F. Supp. 79 (W. D. W. Va.). This Court stated in *Virginian Railway Company* v. *United States*, *supra*, that it has "no concern with the correctness of the [Interstate Commerce] Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it." (272 U. S. 658, 665–666). In *Western Paper Makers' Chemical Company* v. *United States*, 271 U. S. 268, 272, the objection was made that the Interstate Commerce Commission's reasoning and conclusions were inconsistent with conclusions reached by it in similar cases. This Court did not find oc-

casion to discuss this objection because the findings in the case before it were supported by substantial evidence.

There "is no doctrine which prevents * * * an equitable consideration of the special facts of each case * * * Flexibility was not the least of the objectives sought by Congress in selecting administrative rather than judicial determination." *Shawmut Ass'n* v. *Securities and Exchange Commission*, 146 F. 2d 791, 796 (C. C. A. 1). But if the doctrine of *stare decisis* were applicable, the very purpose of securing flexibility in administration would be defeated and the agencies would be prevented from moulding policy in the light of their continuing experience in their fields. Considerations thought to be applicable to a specific factual situation would assume the proportions of inexorable principles binding the agency even after it had learned by its experience that other considerations are of deeper and more permanent significance. Every false start would become a standard for future decisions and every determination on particular, limited facts would be erected into a principle of general applicability. This would be particularly unfortunate when, as in the cases relied upon by the court below, the principles thus established never had the unanimous concurrence of the Commission.

CONCLUSION

The Commission's conclusion, that the respondent was unfit to be entrusted with the responsibilities of a licensee and, consequently, that the public interest would not be served by a grant of its application, is supported by the undisputed findings and is within the scope of the authority conferred on the Commission by the Communications Act of 1934. In setting aside the Commission's order, the court below has exceeded the scope of its judicial competence and has invaded the sphere of administrative discretion, contrary to the repeated admonitions of this Court. The judgment of the court below should, therefore, be reversed.

Respectfully submitted.

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APPENDIX

Communications Act of 1934, c. 652, 48 Stat. 1064, as amended May 20, 1937, c. 229, 50 Stat. 189, 47 U. S. C. 151, *et seq.*:

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said

State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * * * *

SEC. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise.

* * * * *

SEC. 307. (d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and

practice which affect the granting of original applications.

* * * * * *

SEC. 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written

statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

* * * * * *

SEC. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act.

(3) Every license issued under this Act shall be subject in terms to the right of use or control conferred by section 606 hereof.

* * * * * *

SEC. 310. (b) The station license required hereby, the frequencies authorized to be used by the licensee, and the rights therein granted shall not be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of, or indirectly by transfer of control of any corporation holding such license, to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing.

* * * * * *

SEC. 312. (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States: *Provided, however,* That no such order of revocation shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed revocation, has been given to the licensee. Such licensee may make written application to the Commission at any time within said fifteen days for a hearing upon such order, and upon the filing of such

written application said order of revocation shall stand suspended until the conclusion of the hearing conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of revocation.

* * * * *

SEC. 402. (e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 240 of the Judicial Code, as amended, by appellant, by the Commission, or by any interested party intervening in the appeal.

* * * * * * *

SEC. 501. Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, in this Act prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this Act required to be done, or willfully and know-

ingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense, for which no penalty (other than a forfeiture) is provided herein, by a fine of not more than $10,000 or by imprisonment for a term of not more than two years, or both.

SEC. 502. Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs.

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